

LIM KAR BEE

v.

DUOFORTIS PROPERTIES (M) SDN. BHD.

SUPREME COURT, KUALA LUMPUR

HARUN HASHIM SCJ

MOHD. AZMI SCJ

PEH SWEE CHIN SCJ

[CIVIL APPEAL NO. 02-501-91]

13 JUNE 1992

CONTRACT: Sale of land - Agreement of sale dated 1 April 1985 entered into between the appellant and respondent - Declaration of trust dated 26 April 1985 by appellant to hold land in trust for respondent - Originating summons filed by respondent for construction of trust deed and subsequent order to transfer land to respondent - Originating summons proceeded as an action by consent - Purpose of agreement and transaction to avoid payment of estate duty if landowner dies - Two companies formed in pursuance of a scheme devised by tax consultant to avoid payment of estate duty - Whether deception on public administration - Difference between "avoidance of tax" and "evasion of tax" - Question of consideration or value for the sale.

COMPANY LAW: Corporate veil of each company - Whether Courts have discretion to lift corporate veil for purpose of discovering any illegal or improper purpose - Issue of illegality raised.

EVIDENCE: Parol evidence - Whether extrinsic evidence admissible to defeat contract on ground of illegality - Evidence to vary or contradict contract - Section 92(a) Evidence Act 1950.

CIVIL PROCEDURE: Pleadings - Illegality not pleaded - Facts which have not been pleaded emerge in evidence in course of trial showing clearly the illegality - Whether Court can still take judicial notice of illegality and refuse to enforce contract.

This was an appeal against the decision of the High Court, Penang which gave judgment in favour of the prospective transferee, the respondents. In fact, the respondents had filed an originating summons at the High Court, Penang, for the construction of a trust deed dated 26 April 1985 declared by the appellant in favour of the respondents and for a subsequent order to transfer the land in question to the respondent in pursuance thereof.

Held:

[1] The Courts have always set their face against illegality in any contract. It is very well settled that the Courts take judicial notice of such illegality, and refuse to enforce the contract and such judicial notice may be taken at any stage, either at the Court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is *ex facie* illegal.

[2] However, in situations when the contract is not *ex facie* illegal, illegality need not be pleaded but the Court can still take judicial notice of the illegality and refuse to enforce it. The situation is when facts which have not been pleaded emerge in evidence in the course of trial showing clearly the illegality e.g. the illegal purpose of the contract, or its illegal consideration, with the presence of all relevant circumstances.

- a** [3] Evidence of professed intention to avoid paying estate duty is evidence which tends to contradict or vary the documents prepared and signed and such extrinsic evidence is always admissible to defeat a contract on the ground of illegality as provided under s. 92(a) of the Evidence Act 1950.
- b** [4] In this case, the primary purpose of the scheme was to avoid paying the estate duty, especially bearing in mind the said land practically remaining with members of the immediate family of the landowner in the sense that the children and wife of the landowner would control exclusively the holding company without their having paid one cent towards the purchase price of the said land. The scheme was therefore illegal.
- [5] The agreement of sale and purchase of the said land dated 1 April 1985 and the subsequent trust deed dated 26 April 1986 are unenforceable.
- c** [Appeal allowed. Order of High Court set aside. Respondent to pay costs to appellant. Deposit for security for costs to be refunded to appellant.]
- [Bahasa Malaysia Translation of Headnote]
- d** **KONTRAK:** Penjualan Tanah - Perjanjian jualan bertarikh 1 April 1985 yang dimasuki di antara perayu dan responden - Perisytiharaan Amanah bertarikh 26 April 1985 oleh perayu untuk memegang tanah secara amanah bagi responden - Saman pemula difailkan oleh responden untuk pentafsiran suratikatan amanah dan perintah berikutnya untuk memindahkan tanah kepada responden - Saman pemula dijalankan sebagai suatu tindakan dengan persetujuan - Tujuan perjanjian dan transaksi untuk mengelakkan pembayaran duti harta pusaka jika tuan tanah meninggal dunia - Dua buah syarikat ditubuhkan menurut suatu skim yang diikhtiarkan oleh perunding cukai bagi mengelakkan pembayaran duti harta pusaka - Samada perdayaan atas pentadbiran awam - Perbezaan di antara "pelarian cukai" dan "pengelakan cukai" - Persoalan balasan atau nilai bagi jualan.
- e** **UNDANG-UNDANG SYARIKAT:** Tudung Korporat setiap syarikat - Samada Mahkamah mempunyai budibicara untuk menyingkap tudung korporat bagi tujuan menemui sebarang tujuan yang tidak wajar atau menyalahi undang-undang - Isu kepenyalahan undang-undang dibangkitkan.
- f** **UNDANG-UNDANG KETERANGAN:** Keterangan parol - Samada keterangan ekstrinsik boleh diterima untuk mengecewakan kontrak atas alasan kepenyalahan undang-undang - Keterangan untuk mengubah atau menyangkal kontrak - Seksyen 92(a) Akta Keterangan 1950.
- g** **PROSEDUR SIVIL:** Pliding - Kepenyalahan undang-undang tidak diplidkan - Fakta-fakta yang tidak diplidkan muncul dalam keterangan semasa perbicaraan jelas menunjukkan kepenyalahan undang-undang - Samada Mahkamah masih boleh mengambil pengiktirafan kehakiman dan menolak untuk menguatkuasakan kontrak.
- h** Ini adalah suatu rayuan terhadap keputusan Mahkamah Tinggi, Pulau Pinang yang memberikan penghakiman memihak kepada bakal penerima pindahan, responden. Malah, responden telah memfailkan suatu saman pemula di Mahkamah Tinggi Pulau Pinang bagi pentafsiran suatu suratikatan amanah bertarikh 26 April 1985 yang diisytiharkan oleh perayu memihak kepada responden dan perintah berikutnya untuk memindahkan tanah yang dipertikaikan kepada responden menurut kepadanya itu.
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Diputuskan:

[1] Mahkamah lazim memberikan pendapatnya terhadap kepenyalahan sebarang kontrak. Sudah menjadi kelaziman bahawa Mahkamah mengambil pengiktirafan kehakiman akan kepenyalahan undang-undang seperti itu, dan tidak akan menguatkuasakan kontrak tersebut dan pengiktirafan kehakiman yang sedemikian boleh diambil pada mana-mana peringkat, sama ada dalam Mahkamah peringkat “first instance” atau pada peringkat rayuan, tidak kira sama ada kepenyalahan undang-undang diplidkan atau tidak, di mana kontrak itu adalah tidak sah di sisi undang-undang secara *ex facie*.

[2] Walau bagaimanapun, dalam keadaan dimana kontrak itu bukan *ex facie* tidak sah, kepenyalahan undang-undang tidak perlu diplidkan tetapi Mahkamah masih boleh mengambil pengiktirafan kehakiman akan kepenyalahan undang-undang dan enggan menguatkuasakannya. Keadaan seperti ini ialah apabila fakta-fakta yang tidak diplidkan muncul dalam keterangan semasa perbicaraan dilaksanakan dan fakta-fakta dengan jelas menunjukkan kepenyalahan undang-undang iaitu tujuan tidak sah akan kontrak tersebut, atau balasannya yang tidak sah disisi undang-undang dengan kehadiran kesemua keadaan yang relevan.

[3] Keterangan yang mengakui niat untuk mengelak dari membayar duti harta pusaka ialah keterangan yang tampaknya menyangkal atau mengubah dokumen-dokumen yang disediakan dan ditandatangani dan keterangan ekstrinsik seperti itu selalu boleh diterima untuk mengecewakan suatu kontrak atas alasan kepenyalahan undang-undang sebagaimana yang diperuntukkan di bawah s. 92(a) Akta Keterangan 1950.

[4] Dalam kes ini, tujuan utama skim tersebut adalah untuk mengelakkan dari membayar duti harta pusaka, terutamanya dengan mengambil ingatan bahawa tanah tersebut tetap kekal dalam tangan ahli keluarga tuan tanah yang rapat sekali iaitu isteri dan anak-anak tuan tanah itu sebagai pihak pemegang eksklusif yang tidak perlu membayar sesen pun kepada harga belian tanah tersebut. Oleh yang demikian skim tersebut adalah menyalahi undang-undang.

[5] Perjanjian jual-beli tanah tersebut bertarikh 1 April 1985 dan suratikatan amanah yang berikutnya bertarikh 26 April 1986 adalah tidak boleh dikuatkuasakan.

[Rayuan dibenarkan. Perintah Mahkamah Tinggi diketepikan Responden hendaklah membayar kos kepada perayu. Deposit bagi jaminan untuk kos hendaklah dikembalikan semula kepada perayu.]

Cases referred to:

Palaniappa Chettiar v. Arunasalam Chettiar [1962] MLJ 143 (cit)
Leong Poh Chin v. Chin Thin Sum [1959] MLJ 246 (cit)
North Western Sault Co. v. Electrolytic Alkali Co. [1914] AC 461 (cit)
Inland Revenue Commissioners v. Duke of Westminster [1936] AC 1 (cit)
Latilla v. Inland Revenue Commissioners [1943] AC 377 (cit)
Alexander v. Rayson [1936] 1 KB 169 (cit)
Gifford v. Horne [1933] Ch 935 (cit)
Jones v. Lipman [1962] 1 WLR 832 (cit)

Legislation referred to:

Contracts Act 1950, ss. 24
 Estate Duty Enactment 1941, s. 11(i)
 Evidence Act 1950, s. 92 proviso (a)
 Finance Act 1936 [UK], s. 18

For the appellant - Cecil Abraham (J.A. Yeoh with him); M/s. Shearn Delamore & Co. & Drew & Napier

For the respondent - Choong Pee Choy; M/s. Choong & Co.

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*a***JUDGMENT****Peh Swee Chin SCJ:**

The appellant/defendant has been at all material times and still is the registered owner of some valuable land at Batu Ferringhi, Penang, (the appellant is hereinafter called the landowner of the land, the said land). The plaintiff/company has been at all material times, a company registered under the Companies Act (hereinafter called the prospective transferee).

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The prospective transferee filed the originating summons herein, on the face of it, for the construction of a trust deed dated 26 April 1985 and for a subsequent order to transfer the said land to the prospective transferee in pursuance thereof. The trust deed is set out below:

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This Declaration of Trust is made on 26th day of April 1985 by Lim Kar Bee (Nric No. 1341996) of No. 515-M, Jalan Hashim, Tanjong Bungah, Penang (hereinafter called "the Trustee").

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WHEREAS by an Agreement of Sale dated 1st April 1985 made between the Trustee as vendor of the one part and Duofortis Properties Sdn. Bhd., a company incorporated in Malaysia and having its registered office at Suite 302-A, Penang Plaza, Burma Road, Penang, as purchaser of the other part, the Vendor sold and the Purchaser purchased all those four (4) pieces of land known as Lot Nos. 370, 371, 372 and 373, Town of Batu Ferringhi, Section 2, North East District, Penang, (hereinafter called "the Lands") subject to the two existing charges to Ban Hin Lee Bank Berhad *vide* Presentation No. 5917/81 Jilid 210 Folio 66 and Presentation No. 5918/81 Jilid No. 210 Folio 67 to secure overdraft facilities to the extent of RM1,000,000 for use by Lim Kar Bee & Sons Sdn. Bhd. (hereinafter called "the Charges").

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And WHEREAS the full purchase price of RM18,970,000 has been paid by the Purchaser to the Trustee.

And WHEREAS pending the discharge of the said Charges the said lands may not be transferred to the said Purchaser .

NOW THIS DEED WITNESSETH as follows:

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1. The Trustee hereby declares that he holds the said Lands in trust for the said Purchaser, Duofortis Properties Sdn. Bhd. and hereby agrees that he will at the request and costs of the said Duofortis Properties Sdn. Bhd. execute all documents and do all acts and things as may be necessary to effect the transfer and registration of the said Lands in the said Purchaser's name.

2. The trustee shall during the subsistence of the Trust herein collect, and receive the rents, profits and income arising thereon for the benefit of the Purchaser.

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IN WITNESS WHEREOF the Trustee hereto has here unto set his hand and seal the day and year first above written.

Signed and Sealed and Delivered)
by the Trustee, the aforesaid)
Lim Kar Bee in the presence of:)

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sgd.

Gan Teik Chee,

Advocate & Solicitor, Penang

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The agreement of sale of the said land dated 1 April 1984 and referred to herein, and the basis of the trust deed is set out below:

AN AGREEMENT is made on 1 April 1985 between Lim Kar Bee (Nric No. 1341996) of No. 515-M, Jalan Hashim, Tanjong Bungah, Penang, (hereinafter called “the vendor”) of the one part and Duofortis Properties Sdn. Bhd., a company incorporated in Malaysia and having its registered office at Suite No. 302-A, Penang Plaza, Burma Road, Penang, (hereinafter called “the Purchaser ”) of the other part.

IT IS HEREBY AGREED as follows:

1. Subject to the stipulations herein contained the vendor will sell and the Purchaser will purchase the land and hereditaments more particularly described in the Schedule hereto (hereinafter called “the said Property”). **a**

2. The purchase price shall be the sum of Ringgit eighteen million nine hundred and seventy thousand only (RM18,970,000) of which the said sum is now paid by the Purchaser to the vendor (the receipt of which sum the vendor hereby acknowledges). **b**

3. The sale and purchase shall be subject to: **c**
 - (a) the vendor deducing a good marketable and registrable title to the said Property;
 - (b) the said Property being freehold land;
 - (c) any defect in title to be rectified and perfected by the vendor at his own expense;
 - (d) production to the Purchaser of all documents of title in the possession of the vendor **d**;
;
 - (e) vacant possession;
 - (f) the Purchasers shall accept the said Property subject to the two existing charges by Lim Kar Bee to Ban Hin Lee Bank Berhad *vide* Presentation No. 5917/81 Jilid 210 Folio 66 and Presentation No. 5918/81 Jilid 210 Folio 67 to secure overdraft facilities to the extent of Rm1,000, 000 for use by Lim Kar Bee & Sons Sdn. Bhd. **e**

4. The completion of the purchase shall take place at the office of M/s Gan Teik Chee & Ho of 3rd Floor, Wisma MLS, No. 32, Penang Street, Penang.

5. Upon payment of the purchase price within the time stipulated in Clause 4 hereof the vendor shall execute a registrable transfer of the said property in favour of the Purchaser or his nominee(s), such transfer shall be prepared and perfected at the expense of the Purchaser . The Purchaser shall bear all solicitors’ charges. **f**

6. As from the date of this Agreement the Purchaser shall be entitled to possession of the said Property and to the rent and profits thereof and shall likewise from such date be liable to pay the quit rent assessment rates and other out-goings payable thereon, such rents and profits and outgoings to be apportioned if necessary.

7. The vendor shall be responsible for the payment of the Real Property Gains tax and M/ s Gan Teik Chee & Ho shall be authorised to retain from the balance purchase price a sum of RM towards the payment of the said tax. Upon receipt of a notice of assessment from the Director-General of the Real Property Gains tax, M/s Gan Teik Chee & Ho shall use the said retention sum towards the payment of the said tax and any balance shall be paid to the vendor. If the said tax shall exceed the retention sum then the vendor shall pay the difference. **g**

8. The vendor hereby declares that the land and hereditaments sold herein is not subject to acquisition by the government or other acquiring authority and the Purchaser shall not raise any objection or requisition in this regard. If the land and hereditaments sold shall have been subject to acquisition by the government under s. 4 or 8 of the Land Acquisition Act 1960 at the date of this Agreement, then the vendor shall refund the deposit paid to account of the purchase price to the Purchaser without interests costs or damages and this Agreement shall be treated as cancelled and no action shall be taken by either party against the other. **h**

9. **i**

a 9. The said Property has been and is open to inspection and the Purchaser shall be held to have had notice of all notices and requirements of government and local authorities, and all such notices and requirements shall be complied with by the Purchaser at his own expense. The said Property is likewise sold subject to any road widening, drainage improvement or other schemes whatsoever affecting the said Property and the Purchaser shall be deemed to have full knowledge of the nature and effect thereof and shall make no objection or requisition in respect thereof.

b 10. The Purchaser shall be entitled to specific performance of the purchase herein.

11. Any notice or demand required to be given or made to either party shall be in writing and shall be sufficiently served if the same is sent by registered post to his or her address herein stated or at his or her last known address in the States of Peninsular Malaysia and shall be deemed to have been received by him or her on the day following the date on which it was posted.

c 12. In this Agreement where the context so admits:

(a) the expression "the vendor " includes the personal representatives heirs and assigns if it is a person and the successors and assigns if it is a company;

d (b) the expression "the Purchaser " includes the personal representatives heirs and assigns if it is a person and the successors and assigns if it is a company;

(c) words importing the masculine gender only include the feminine and neuter genders;

(d) words importing the singular number only include the plural.

IN WITNESS WHEREOF the parties hereto have hereunto set their hands the day and year first above written.

e **THE SCHEDULE ABOVE REFERRED TO:**

All that four (4) pieces of land and hereditament situate in the North East District, Penang known as Lot Nos. 370, 371, 372 and 373, Bandar Batu Ferringhi, Sek. 2, Penang comprised in Grant Nos. 6770, 6771, 6772 and 6773 respectively.

f Signed by the vendor)
in the presence of:)
Sgd.
Advocate & Solicitor
Penang

g Signed by the Purchaser)
in the presence of:)
Sgd.
Advocate & Solicitor
Penang

h By consent, the originating summons proceeded as an action as if it had been begun by writ and the matter was subsequently continued by evidence *viva voce* with the High Court at its conclusion giving judgment as prayed to the prospective transferee and from that judgment the landowner has appealed. Judgment of this Court was reserved for further consideration and we now give our judgment.

In the initial supporting affidavit of the originating summons herein and her evidence in Court by Lim Suan Sim (f) (PWL), the prospective transferee was incorporated together with another company for the express purpose of avoiding payment of estate duty, the other company

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being Lim Kar Bee & Sons Sdn. Bhd. (hereinafter called the holding company). The two companies were formed in pursuance of a scheme devised by a tax consultant to avoid payment of estate duty payable in regard to the said land should the landowner die. **a**

The said scheme to avoid paying estate duty was referred to very often in evidence as estate duty planning scheme which involved a series of transactions, fairly complex and intricate but understandable. **b**

It would not be essential for the purpose of our judgment, to set out the steps and documents one by one designed to achieve the purpose of avoiding the payment of estate duty except in a way as brief as possible. By the agreement of sale the landowner was supposed to have sold the said land to the prospective transferee for RM18,970,000 in consideration of allotment of shares to the holding company of 18,970,000 shares of par value of RM1 each in the prospective transferee, with the holding company holding the equity of the prospective transferee (that is the plaintiff company) and with the landowner recorded to have been owed RM18,970,000 by the holding company in the books of the holding company. Then 1,355,000 **ORDINARY** shares of RM1 each in the equity of the holding company were acquired by the landowner at the price with a premium of RM13 per share for a total value of RM18,970,000 from the holding company by the landowner setting off against such price by the indebtedness to the landowner in the books of the holding company in the said sum of RM18,970,000 which was the original purchase price of the said land as set out in the sale agreement of the said land. After that, the holding company would then convene an extra **ORDINARY** general meeting to convert the said 1,355,000 **ORDINARY** shares into non-convertible accumulative **PREFERENCE** shares of par value of RM 1 each without voting rights but preferentially entitled to 2% dividend per year, and the landowner's wife and children would exclusively be given and allotted the **ORDINARY** shares of the holding company with voting rights. **c**
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The whole scheme was devised by the tax consultant firm in question of which PW5 was their manager. According to PW5 it seems that the scheme of avoiding the estate duty was basically grounded on these non-convertible cumulative **PREFERENCE** shares at the par value of RM 1 each. The minimum value of assets of a deceased person that would attract the payment of estate duty was RM2 million then. The **ORDINARY** shares of a company owned by a deceased person would attract duty under the law then applicable, at the rate based on the value of the assets of the company but the value or the par value of cumulative **PREFERENCE** shares of RM 1 each would remain at RM 1 each by way of valuation for the purpose of assessment of estate duty thereon. In the instant case, the value for estate duty purpose of 1,355,000 **PREFERENCE** shares would therefore be less than the minimum value of RM2 million chargeable with estate duty and therefore none would be payable. PW5, in connection with the special resolution proposed and passed at the general meeting of the holding company for conversion of 1,355,002 **ORDINARY** shares of par value RM1 each into non-convertible cumulative **PREFERENCE** shares of par value RM1 each, said and to quote: **f**
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We were trying to ensure that the scheme would not be challenged by the Inland Revenue Department. We were trying to make this scheme as authentic as possible. **h**

It would have been noticed that I have added emphasis by the liberal use of capital letters in writing this judgment.

Section 11(i) of the Estate Duty Enactment 1941 which was then applicable and in force, but which has now since been repealed provided as follows: **i**

- a** 11(i) Where there passes on the death of any person dying after this Enactment any shares (not being PREFERENCE shares) in any company to which this Part of this Enactment applies, then if either:
- (a) ...
- (b) ...
- b** the principal value of those shares for the purposes of estate duty shall not be ascertained in the manner provided by s. 20 of this Enactment, but shall be ascertained by reference to the value of the total assets of the company:
- Provided that in cases falling within paragraph (a) of this subsection, the value of the total assets of the company shall, for the purposes of this section, be deemed to be reduced by the sum of money therein referred to.
- c** This must be the section which the tax consultants in question had in mind.
- The issues that were raised and contested in the Court below were that the various documents prepared and though signed by the landowner; were not explained to the landowner; that there was misrepresentation by PW1, his daughter and that there was also undue influence. In respect of these issues, the learned Judge has dealt with them admirably and come to conclusions against the landowner and granted the order as prayed in the originating summons.
- d** On appeal before us, *inter alia*, in the memorandum of appeal of the landowner, its para. 7 says:
- The learned trial Judge erred in law and in fact in holding that upon the true construction of the Trust Deed dated 26 April 1985 and in the events which had happened the appellant holds the said lands in trust for the respondents and in so doing failed to appreciate that the shares purportedly issued in pursuance of an alleged estate duty planning scheme towards purported satisfaction of the full purchase price of RM18,970,000, if at all admissible for the purpose of construing the said Trust Deed, which is denied, had not in fact been issued and that if at all issued are illusory shares without consideration or value and a deception on public administration.
- e**
- f** This illegality was raised for the first time before us, it not having been raised or pleaded earlier.
- Learned Counsel for the landowner submitted on this ground. I had enquired of learned Counsel for the prospective transferee as to whether the scheme was a deception on public administration as alleged, he said it was not, but did not have any judicial precedents to cite to Court on the validity of such a tax-saving scheme. The prospective transferee maintained that it was a scheme to avoid duty or tax, therefore legal, and not to evade it, which would then otherwise be illegal. The difference between “avoidance of tax” and “evasion of tax” was emphasized.
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- h** Courts have always set their face against illegality in any contract. It is very well settled that the Courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the Court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is *ex facie* illegal.
- When the contract is not *ex facie* illegal, then on the question of pleadings, there is only one situation where illegality need not be pleaded when the Court can still take judicial notice of illegality and refuse to enforce it. The situation is when facts which have not been pleaded
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emerge in evidence in the course of the trial showing clearly the illegality e.g. the illegal purpose of the contract, or its illegal consideration, with the presence of all relevant circumstances, see e.g. *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] MLJ 143, *Leong Poh Chin v. Chin Thin Sum* [1959] MLJ 246, and *North Western Sault Co. v. Electrolytic Alkali Co.* [1914] AC 461 just to mention a few. The existence of such a situation in the instant appeal is warranted by the facts that emerged in evidence, including affidavit evidence.

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The various documents designed and employed at the instance of PW5, are *ex facie* lawful but PW1 and PW5 and others have given evidence in the course of this case showing that all these documents, including the agreement of sale and the trust deed mentioned above had one purpose in common that is to avoid paying estate duty.

b

Is it an illegal purpose? Such evidence of such professed intention to avoid paying estate duty is evidence which tends to contradict or vary the documents prepared and signed, for example, to contradict the sale and purchase agreement of the said land; the agreement purporting to be a *bona fide* commercial transaction of sale at a fixed price the receipt of which was acknowledged.

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Such extrinsic evidence however is always admissible to defeat a contract on the ground of illegality even if such extrinsic evidence may vary or contradict the contract. There is no need to look for the authority for saying so, for our own s. 92(a) of Evidence Act 1950 has seen to it. Although evidence of such intention to avoid paying estate duty, as declared by the witnesses, is highly relevant for the purpose of considering the question of illegality of contract, let us look as we are obliged to look at the circumstances in the case especially the various documents designed and signed whether they could be correlated to such evidence of intention.

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The ingenuity of PW5 lies in the conversion of 1,355,002 **ORDINARY** shares of par value at RM1 acquired at a premium of RM13 per share in the holding company into non-convertible cumulative **PREFERENCE** shares at the par value of RM1 each, bearing in mind that the total cost of each acquisition of the earlier **ORDINARY** shares would be equal to the value of the said land that is the purchase price stated in the agreement of sale. The whole scheme was tailor-made to produce the nett result that if the landowner had passed away immediately after all the scheme documents were signed, not one cent would be payable as estate duty.

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The justification for declaring such intention in oral evidence or in affidavit to avoid paying the estate duty and for the various documents to be drawn up and signed seems to be that they were “avoiding” estate duty and not “evading” the same, so that their scheme must be legal. Is this contention tenable?

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While the words “tax evasion” no doubt suggest illegality, the words “tax avoidance” do not necessarily indicate an unassailable hallmark of legitimacy as seemingly contended for by the prospective transferee. PW1 and PW5 openly used the expression of tax avoidance as if by its recitation, the scheme in question would be or become legitimate thereby *ipso facto*. The expression could have been possibly derived from a dictum of Lord Tomlin in *Inland Revenue Commissioners v. Duke of Westminster* [1936] AC 1, 19 that “every man is entitled if he can to order his affairs so that the tax attaching under the appropriate Act is less than it otherwise would be”. Such genial spirit can be contrasted with the rather critical attitude of Viscount Simon LC in *Latilla v. Inland Revenue Commissioners* [1943] AC 377, 381 who described such kindred ingenuity as a “not commendable exercise of ingenuity”.

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a In *Latilla*, s. 18 of Finance Act 1936 of the United Kingdom was enacted for the prevention of avoidance of income tax by tax-payers transferring their assets to persons residing outside the United Kingdom so that income became payable to persons residing outside the United Kingdom.

b To avoid this avoiding Act, the tax-payer there transferred her share in a mining partnership to a company incorporated in the then Rhodesia and that Rhodesian company, in consideration therefor, issued shares and non-interest-bearing debentures in her favour. No dividend was ever declared on her shares issued but instead the Rhodesian company applied its profit received from the mining firm by redeeming the debentures issued to her. The tax-payer was assessed for income tax for her original share of profit in the mining firm paid to the Rhodesian company by the mining firm. The assessment was upheld by Special Commissioners, by High Court, Court of Appeal and finally the House of Lords which found against her, *inter alia*, stating that the redeeming of the debentures might serve as a means of transferring the profit of the mine in the form of capital.

c The prominent issue argued there was that the avoidance of British taxation was not the main purpose of those arrangements and that they were a *bona fide* commercial operation not designed for the purpose of such avoidance.

d Now that English case above was of course not concerned directly with the validity of those documents or transactions but with the validity of the assessment of tax, nevertheless the upholding of the assessment involved necessarily the rejection as unlawful of those transactions of the tax-payer with the Rhodesian company, and in that case the tax-payer there never said that she had done all that to avoid paying income tax.

e Section 24 of Contracts Act 1950 provides as follows:

Section 24:

The consideration or object of an agreement is lawful unless-

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- (a) it is forbidden by a law;
 - (b) it is of such a nature that, if permitted, it would defeat any law;
 - (c) it is fraudulent;
 - (d) it involves or implies injury to the person or property of another; or
 - (e) the Court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful.

g Every agreement of which the object or consideration is unlawful is void.

Before dealing further with the said s. 24 of Contracts Act, it should be emphasized that all the relevant documents drawn up on the advice of the tax consultant firm have all emanated from the euphemistically-called estate duty planning scheme which, if it is found to be illegal, would render all the said documents tainted with illegality and unenforceable.

h In addition to the large number of local cases on illegality, it would be helpful to refer to an English case more akin to our instant one.

In *Alexander v. Rayson* [1936] 1 KB 169, the defendant agreed to take a lease in Piccadilly for £1,200.00 p.a. However the plaintiff (that is the lessor), sent two documents for her signing, one being the lease of the flat at £450.00 p.a. and another document for services of the

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lessor at £750.00 p.a.. The services agreement referred to services practically the same as already provided for in the lease except the provision of a refrigerator and its maintenance. The two sums payable under the two documents totalled the sum of £1,200.00 p.a.

a

When the defendant was sued subsequently for the money due on these two documents, the defendant pleaded illegality and the Court found that only the lease with rent at £450.00 p.a. was produced to Assessment Committee of the City Council there for reducing successfully the flat's rateable value. The Court of Appeal held that illegality was established and the Court would not assist the plaintiff in enforcing these documents.

b

There seems to be some difficulty in drawing the line between the dictum of Lord Tomlin and that of Viscount Simon LC but in our view, the real test seems to be, in any given transaction, whether the primary purpose of the transaction is to avoid tax, if it is, it is an illegal purpose that is of such a nature that, if permitted, it would defeat the tax law in question, coming under subsection (b) of s. 24 of the Contracts Act, 1950.

c

In our opinion, the primary purpose of the scheme was to avoid paying the estate duty, especially bearing in mind the said land practically remaining with members of the immediate family of the landowner in the sense that children and wife of the landowner would control exclusively the holding company without their having paid one cent towards the purchase price of the said land. The scheme was therefore illegal.

d

When the issue of illegality was raised, we have lifted the corporate veil of each company wherever we have found it necessary, for it is well settled that the Courts have a discretion to lift it for the purpose of discovering any illegal or improper purpose, e.g. see *Gifford v. Horne* [1933] Ch 935 in which the defendant, a former employee of the plaintiff had covenanted not to solicit plaintiff's customers. Defendant sought to avoid this by forming a company to solicit. Both the defendant and the company were restrained by injunction; and *Jones v. Lipman* [1962] 1 WLR 832 in which the defendant sought to avoid completing the sale of his house to the plaintiff by conveying it to a company formed for the purpose. Both the defendant and his company were ordered to specifically perform the contract.

e

Our conclusion thus disposes of the appeal without the necessity of dealing with other issues canvassed before us.

f

We therefore hold that the agreement of sale and purchase of the said land dated 1 April 1985 and the subsequent trust deed dated 26 April 1986 are unenforceable. The appeal is therefore allowed and order of the learned Judge set aside. The respondent would have to pay costs to the appellant to whom the deposit for security for costs is to be refunded also.

g

Also found at [1992] 3 CLJ 1667

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